Citations to Opinions and Judgments

The opinion of the Appellate Division, Fourth Department, of the State of New York is reported at 26 A. D. 2d 97; 270 N. Y. Supp. 2d 871; the opinion for reversal by the Court of Appeals is reported at 21 N. Y. 2d 357; 288 N. Y. Supp. 2d 33; 235 N. E. 2d 101. The decision for reargument by the New York Court of Appeals is reported at 22 N. Y. 2d 973. The dismissal of the respondent's appeal to this Court under Rule 60 is reported at 393 U. S. 929. The decision of affirmance upon reargument by the New York Court of Appeals is reported at 23 N. Y. 2d 933; 298 N. Y. Supp. 2d 513; 246 N. E. 2d 361. The decision of the New York Court of Appeals denying reargument and amendment to its remittitur is reported at 25 N. Y. 2d ____ and has not yet been officially reported.

Jurisdiction

The judgment of the New York Court of Appeals denying reargument and amendment to its remittitur was entered on June 4, 1969.

The jurisdiction of this Court rests on 28 U. S. C. § 1257(3).

Questions Presented

The federal constitutional questions were raised in an Agreed Statement of Facts entered into by the parties hereto for a Submission of Controversy before the Appellate Division, Fourth Judicial Department, pursuant to New York Civil Practice Law and Rules § 3222, as follows:

> "15. The controversy hereby submitted for decision is whether or not Liberty National Bank and Trust Company is an instrumentality of the United

States government and, therefore, as a purchaser, is immune from the above sales and use taxes imposed by the State of New York, and, if it is such an instrumentality, whether it is immune from the sales and use taxes imposed by the County of Erie."

"16. Petitioner claims and demands that upon the foregoing facts it is entitled to judgment that as a national banking association it is an instrumentality of the United States government and immune, insofar as it is a purchaser, from the payment of the retail sales and compensating use taxes imposed by the County of Erie and the State of New York and a judgment compelling and directing the respondent, William K. Buscaglia, as Director, Division of Sales Tax, County of Erie, to forthwith order a refund to the petitioner of all retail sales taxes and compensating use taxes erroneously, illegally and unconstitutionally collected from it since April 19, 1963, together with interest thereon."

Following the decision of the New York Court of Appeals upon reargument (23 N. Y. 2d 933), petitioners moved for reargument and an amendment to the remittitur so as to certify the following questions:

"Upon the appeal herein there was presented and necessarily passed upon the following questions under the Constitution of the United States, namely:

"(a) national banks, as they function today, are not Federal instrumentalities so as to have implied Federal constitutional immunity from the imposition of state and local sales and use taxes;

"(b) the taxing power preserved under the Tenth Amendment to the Constitution of the United States permits the imposition of state and local sales and use taxes upon national banks;

"(c) Congress has no constitutional authority to immunize national banks, as they function today, by Section 548 of the National Banking Act."

The New York Court of Appeals on June 4, 1969 (25 N. Y. 2d ____) denied petitioners' motion as follows:

> "A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is
>
> "ORDERED, that the said motion be and the same hereby is denied insofar as it seeks reargument, and it is
>
> "ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is denied upon the ground that the decision of the Court of Appeals (23 N. Y. 2d 933) indicates the federal questions necessarily passed upon (*cf. People* v. *Baker,* 23 N. Y. 2d 898)."

Since these questions were neither argued nor briefed by the parties, the majority opinion of this Court in *First Agricultural Bank* v. *Tax Commission,* 392 U. S. 339 purposely avoided answering these constitutional questions, as follows (393 U. S. 339, 341):

> "Because of pertinent congressional legislation in the banking field, we find it *unnecessary to reach the constitutional question* of whether today national banks should be considered nontaxable as *federal instrumentalities.*" (Emphasis added.)

Similarly, these questions were neither argued, briefed nor passed upon by this Court in *Dickinson* v. *First National Bank of Homestead,* 393 U. S. 409, rehearing denied 393 U. S. 1124.

Article VI, Clause 2 of the Federal Constitution provides:

> "Constitution, laws and treaties of the United States to be supreme.—2. This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article X of the Federal Constitution provides:

"Powers not delegated, reserved to States and people respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statement of the Case

Since the facts had been agreed upon by the parties in the Agreed Statement of Facts, they are not in dispute (Record, pp. 1-49, inclusive). Therefore, for purposes of this petition, they need not be set forth herein, with the exception of paragraphs 15 and 16 thereof, reproduced above. Essentially, the Statement agreed upon merely recites the fact that the respondent is a national bank which has been subject to the application of the sales and use taxes imposed by the County of Erie and the State of New York upon certain itemized retail sales transactions for which tax refunds have been sought upon the ground that respondent possesses constitutional and statutory immunity from such taxation as an instrumentality of the United States.

REASONS FOR GRANTING THE WRIT

This Court's decisions in the *First Agricultural Bank* case and in the *Dickinson* case are not dispositive of the issues, since this Court did not consider the Tenth Amendment and if national banks, as they function today are not federal instrumentalities Congress has no constitutional authority by virtue of the Tenth Amendment to immunize them by § 548 of the National Banking Act.

1. The decisions in *First Agricultural Bank* and in the *Dickinson* cases are completely distinguishable.

This Court's decisions in *First Agricultural National Bank* v. *Tax Commission*, 392 U. S. 339 (1968) do not dispose of the present constitutional questions arising under the Tenth Amendment to the Federal Constitution concerning the sovereign taxing powers of the States thereunder. These questions are so real and substantial as to warrant full review by this Court in order to resolve basic constitutional issues of utmost concern.

The opinion of the majority (BLACK, J.) in the *First Agricultural Bank* case, *supra*, discloses that this Court decided that case solely upon a non-constitutional ground, as follows (*ibid.*, p. 341):

> "Because of pertinent congressional legislation in the banking field, we find it *unnecessary to reach the constitutional question* of whether today national banks should be considered non-taxable as federal instrumentalities." (Emphasis added.)

This appears to be the result of the Court's custom in the field of constitutional immunity to resolve disputes upon the basis of statutory construction by avoiding constitutional issues where it is *assumed* that the statute should govern (12 U. S. C. A. § 548; see, *e.g.*, *Carson* v.

Roane-Anderson Co., 342 U. S. 232, 236 [1951]; *Federal Land Banks* v. *Kiowa Co.*, 368 U. S. 146, 156 [1961]; see, also, *Sullivan* v. *United States*, 395 U. S. 169 [1969].) We submit, however, that this Court's construction of § 548, *supra*, is valid *only* if national banks, as they function today, are *true* Federal instrumentalities. If not, they then are merely *private* business corporations which the Congress has absolutely no constitutional authority to confer immunity from the taxes here involved. If the constitutional justification for § 548 no longer exists, then Congress cannot divest the States of their sovereign taxing powers guaranteed by the Tenth Amendment, *supra*. Under such circumstances, the Tenth Amendment is activated and becomes supreme so as to permit the imposition of the taxes here involved. These constitutional questions raised herein were *neither argued, briefed nor passed upon* by this Court in either the *First Agricultural Bank* case, *supra*, or in the *Dickinson* case, *supra*. Indeed, the parties in the *Dickinson* case did not even refer to the relevant decisions of this Court dismissing the appeals which were rendered in *Hamm* v. *Boeing Co.*, 394 U. S. 320 (1969) and in *Makah Indian Tribe* v. *Tax Commission*, 393 U. S. 8 (1968). In the *Boeing* case, *supra*, the lower Court held that a government contractor performing work for the National Space Agency of the Federal government, clearly a Federal instrumentality, was not entitled to governmental immunity from a State sales and use tax under the theory that it is actually an agent of the Federal government in making purchases of items called for under government contracts and such Court held that contractor had not been (216 So. 2d 288, 296):

> "so incorporated into the government structure as to become an instrumentality of the United States and thus enjoy governmental immunity."

In the *Makah Indian Tribe* case, *supra,* the Tribe sought to enjoin the application of the Washington State cigarette tax on cigarettes sold by wholesalers to retail outlets doing business on the Indian reservation wherein the Tribe argued it would interfere with Indian commerce in violation of the United States Constitution, Article I, Section 8, Clause 3, which gives to the Congress the power to regulate commerce with the Indian Tribes. The lower Court held (434 P. 2d 580, 581):

> "We think the states are prohibited only from imposing taxation which so directly regulates or substantially encumbers the area of Indian trading on Indian reservations as to *represent interference with the federal policy* of careful control and protection of Indian trade.
>
> * *"

and (*ibid.,* 582):

> "and that its effect upon the Makah tribe, or any of its members, is '*too indirect and remote* to render it unconstitutional.'" (Emphasis added.)

By the same token, there is no interference here with either a Federal policy, nor a tax upon a Federal instrumentality as demonstrated herein.

We urge that a full re-examination of the legislative history of § 548 of the National Banking Act and its antecedents be undertaken. For example, the remarks of Senator Fessenden, quoted by the majority in the *First Agricultural Bank* case, *supra,* 392 U. S. 339, 343, should be construed in the light of their contextual setting because they evidence his concern and were directed solely to the adverse effect of State taxation upon the nation's currency and the credit of the United States (*i.e.,* national bank notes) which were to be secured by United States Bonds. In substance, the bill imposed: (1) a duty on cir-

culating bank notes, (2) a duty on bank deposits, and (3) a duty on capital stock "beyond the amount invested in United States bonds". The bill finally became § 41 of ch. 106, 1864 (13 Stat. 111-112).

The precise reason for the enactment of the National Bank Act of 1864, as its title specifically states, and certainly confirmed by the 1864 Congressional debates thereon, was to "* * * Provide a National Currency, *secured* by a Pledge of United States Bonds and to Provide for the Circulation and Redemption Thereof" (13 Stat. 99). This must be compared with the similar title to the Federal Reserve Act, later enacted (38 Stat. 251) which provided "An Act to provide for the establishment of Federal reserve banks, to furnish an *elastic currency*, * * *".

However, the *coup de grâce* eliminating national bank immunity occurred in 1935 when the Congress withdrew Congressional authority of national banks to *issue national bank* notes as part of the nation's *currency*. This withdrawal by Congress of its constitutional power to regulate currency to such extent (Const., Art. I, cl. 5; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373 [1913]; *cf. Smith* v. *Davis*, 323 U. S. 111 [1944], a power as supreme as the borrowing power, *Society for Savings* v. *Bowers*, 349 U. S. 143 [1954]; *Free* v. *Bland*, 369 U. S. 663 [1962]), *simultaneously* withdrew from national banks their status as Federal instrumentalities and clearly terminated all need for further protection theretofore secured by constitutional supremacy or by § 548, *supra*, originally enacted pursuant thereto in order to *safeguard* the currency secured by United States Bonds. Consequently, national banks thereafter ceased to be Federal instrumentalities. Accordingly, all of the bank cases which had sustained immunity in the past *must* be construed in light of the Federal functions

then permitted at the time of decision, and upon such construction, thereupon isolated, since they no longer govern the situation today.

Up to 1935 Congress had the Constitutional right to permit national banks "to facilitate the performance of governmental functions—[and] . . . the right to protect the operations thus validly authorized" (*cf., e.g., Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32-33 [1939]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961], as corporations which are *true* Federal instrumentalities, *supra*). But when the governmental function is withdrawn, the protection is likewise withdrawn, and the principle that "when Congress Constitutionally creates* a corporation through which the Federal government lawfully acts, the activities of said corporation are 'governmental'—not proprietary" no longer applies. (*Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95, 102 [1941]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961]; see also *Callam County, Washington et al.* v. *United States* and *United States Spruce Production Corp.*, 263 U. S. 341 [1941]; *Pittman* v. *Home Owners' Corp., supra,* 308 U. S. 21 [1939]). Indeed, national banks stand today upon no different tax footing under the governmental immunity doctrine from, for example, those *proprietary functions* performed by the States which have been held subject to federal taxation for want of implied governmental immunity in the other direction (see *e. g., Helvering* v. *Gerhardt,* 304 U. S. 405 [1938]; *Allen* v. *Board of Regents,* 304 U. S. 439 [1938]; *New York* v. *United States,* 326 U. S. 572 [1945]; *Wilmette Park Dist.* v. *Campbell,* 338 U. S. 41 [1949]; *Parden* v. *Terminal R. Co.,* 377 U. S. 184, 196 [1963]).

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* Here, of course, national banks are not *created* by Congress—they merely came into being of their own volition under permissive legislation (Title 12, U. S. C. A. §§ 21, *et seq.*).

In view of the foregoing, we further submit that this Court should also re-examine the 1950 bill to amend § 548, *supra,* which was referred to in the majority opinion in the *First Agricultural Bank* case, *supra.* There it was said (392 U. S. 339, 346):

> "Finally, in 1950 a bill was sent to the Senate Committee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks, but Congress did not pass it.[9] [9. See Hearing on S. 2547 before Subcommittee on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 2d Sess., 9 (1950)]."*

However this quotation seems to have been adopted from a brief reference thereto in the *First Agricultural Bank's* brief (p. 21), and was *neither answered nor objected* to in the answering brief of the Massachusetts Tax Commission. In the light of subsequent Federal legislation, *infra,* sponsored by the Senate Banking Committee in the area of Federal instrumentalities, a full re-evaluation of the subcommittee report, referred to above, should be made because profound objections do exist with respect to Congressional intent. What the *First Agricultural Bank's* brief *failed* to point out was that a fair reading of the entire report of the Banking Subcommittee shows no Congressional *intent* that any permissive legislation was needed in this area at all. On the contrary, the report clearly shows only that its proponents merely felt that the proposed Senate bill was *desirable* and that the Federal Government had no objections thereto. (See, also, *Cong. Rec.,* 81st Cong., 2d Sess., p. 17085.) Indeed, the sub-

* Our research has disclosed that no similar Congressional bill to Senate 2457, *supra,* has been introduced in succeeding Congresses until the summer of 1968 when H. R. 19031 was introduced to specifically overcome the decision in the *First Agricultural Bank* case, *supra,* as is the case with a 1969 bill, H. R. 7491 which has passed the House, 342-4, and is awaiting action in the Senate.

committee chairman himself noted its inconsequential effect by saying that the *McCulloch* case (*McCulloch* v. *Maryland,* 4 Wheat. 316) was one "involving an effort to tax the Bank of the United States by the State of Maryland in such a way that the Bank *could not have successfully operated*" (emphasis added, *ibid.*, p. 2).

It must be pointed out, too, that the Senate Banking and Currency Committee merely reported, in part, to the Senate in its "Summary of Activities" during the 81st Congress on the 1950 bill, Sen. 2457, *supra,* that "The bill was not reported as the session was drawing to a close and full attention of Committee was then focused on Defense Production Act." (*Cong. Rec.,* 81st Cong., 2d Sess., p. 17085.) There is, of course, *not one word* in the subcommittee's report which deals with the present question as to whether national banks are *actually Federal instrumentalities.* Therefore, since the 1950 bill was never reported out of the Senate Banking Committee for Senate vote and was never introduced in the House of Representatives it should not be construed as evidencing any Congressional intent at all, from which to even infer any judgment on the part of (1) the Senate Banking Committee, (2) the Senate itself or (3) to the House of Representatives.

Indeed, in sharp contrast, subsequent action by the Senate Committee on Banking also completely destroys any claim that national banks are Federal instrumentalities. The Senate Committee on Banking and Currency specifically reported in 1961 on those Federal corporations, financial institutions, or agencies of the Federal Government having *statutory tax exempt status,* for example, as follows: Federal Reserve Banks (12 U. S. C. 531), Federal Land Banks (*ibid.*, 931), Federal Farm Mortgage Corporation (*ibid.*, 1020f), Federal Intermediate Credit Bank (*ibid.*, 1111), Central Bank for Cooperatives (*ibid.*, 1138c),

Federal Home Loan Bank (*ibid.*, 1433), Federal Savings and Loan Associations (*ibid.*, 1464), Federal National Mortgage Association (*ibid.*, 1716), Federal Savings and Loan Insurance Corporation (*ibid.*, 1725), Federal Housing Debentures (*ibid.*, 1747g), Federal Deposit Insurance Corporation (*ibid.*, 607), Reconstruction Finance Corporation (*ibid.*, 607), Community Credit Corporation (*ibid.*, 713a-5), Certain Government Securities (31 U. S. C. 868), Public Housing Administration (42 U. S. C. 1405(e)) (see 1961 *U. S. Code Cong. and Admin. News*, Vol. 2, pp. 2006-2007). These named corporations, among others itemized by statute (Government Corporations Control Act [1945, as amended], Title 31, ch. 14, §§ 846 and 847) were either defined by Congress as "wholly owned Government Corporations" (41 such corporations) or as "mixed ownership Government Corporations" (4 such corporations) (*ibid.*, §§ 846, 847), and were also by the same Act, declared to be *"an agency or instrumentality of the United States"* (*ibid.*, § 869, emphasis added).

National banks, of course, were not included in either category, nor was this legislation ever called to the attention of this Court in the *First Agricultural* case, *supra*.

The legislative history of the Act* clearly disclosed that a "Government Corporation is a constitutional means of carrying into effect legitimate powers of the Federal Government"; that its intent was that "it prohibits the creation of any Government Corporation to act as an *agency* or *instrumentality* of the United States except by or pursuant to action of Congress, and requires those now operating under State charters to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to re-

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* *Senate Rep.* No. 694, 1945 by Senate Banking and Currency Committee, *U. S. Code Cong. Service*, 79th Cong., 1st Sess., 1945, pp. 888, 890 and 901.

incorporation by act of Congress" emphasis added; see also Title 31, *supra*, § 839); and that "It further provides that no corporation shall be *created, organized* or acquired hereafter by any officer or *agency* or *instrumentality* of the United States, except by act of Congress or pursuant to an act of Congress specifically authorizing such action" (emphasis added). Again, national banks have not been so designated by any act of Congress. Indeed, the Treasury Department in which the Comptroller of the Currency serves (see *e.g., United States Government Organization Manual*, 1968-69, pp. 97-107), also ruled in 1963 that national banks are not an "agency or instrumentality of the United States" under the Internal Revenue Code, as follows (Internal Revenue Bulletin, Cum. Bul. 1963-2, p. 585):

"Section 4384.—Liability for Tax

26 CFR 47.4384-1: Liability for Tax. Rev. Rul. 63-217

"National Banks frequently are parties to conveyances of realty. Under the provisions of section 4384 of the Internal Revenue Code of 1954, as amended, the United States or any agency or instrumentality thereof shall not be liable for the documentary stamp tax on conveyances of realty, imposed by section 4361 of the Code, with respect to an instrument to which it is a party.

"*Held*, the exemption from liability provided by section 4384 of the Code does not apply to a national bank which is a party to a conveyance of realty, *since such a bank, being a private corporation, is not an 'agency or instrumentality'* of the United States for purposes of that section of the Code." (Emphasis supplied.)

2. In the present case the tax power of the State is supreme under the Tenth Amendment.

Long ago and prior to the adoption of the Federal Constitution, Alexander Hamilton* spelled out in his *Federalist Papers* the historical and pragmatic concepts involved under our dual Federalistic system between the taxing powers of the National Government and those of the States. This dealt with their respective rights of supremacy—those delegated to the United States by the Constitution and those retained by the States by the Tenth Amendment (see *The Federalist*, Jacob E. Cooke Edition, 1961, No.'s 31-34, ind., pp. 193-215). The States *surrendered* only their right to tax imports, exports, and tonnage (Constitution, Art. I, § 8), and retained all other taxing powers (*ibid.*, No. 33, p. 203; see also *United States* v. *Allegheny Co., supra,* 322 U. S. 174, 176 [1943]), so "basic to sovereignty of the States" (see *e.g., Railroad* v. *Peniston,* 18 Wall 5 [1873]).

The Federal Constitution contains few *express* restrictions upon this taxing power of the States. (Art. I, § 10, cl. 2; *The Federalist, ibid.*, No. 33, pp. 200-208; *Allegheny Co., supra; Richfield Oil Corp.* v. *State Board,* 329 U. S. 69 [1946]; *Canton R. Co.* v. *Rogan,* 340 U. S. 511 [1950]; *Atlantic Gulf and Pacific Oil Co.* v. *Gerosa,* 16 N. Y. 2d [1966], app. den. 382 U. S. 368; *Shell Oil Co.* v. *State Board,* 414 P. 2d 820 [1966], app. den. 386 U. S. 211), and the *implied* restrictions are few, and then only in those areas where the Federal Government is supreme under certain

* Hamilton, of course, was the Father of the First Bank of the United States (see *Annals of Congress,* 1897 Ed. which contain the Congressional debates on the creation of the First Bank), which was involved in *McCulloch* v. *Maryland,* 4 Wheat. 316 [1819] and in which the doctrine of implied constitutional immunity was formulated.

limited circumstances. For example, no tax may be imposed upon a *privilege* reserved by the Constitution, such as the *right* to free speech (*Murdock* v. *Pennsylvania,* 319 U. S. 105 [1942]), or to tax interstate commerce which has no relation to the opportunities or benefits which it confers (*Standard Oil Co.* v. *Peck,* 342 U. S. 382 [1951]), or discriminating taxation against or place undue burdens upon such commerce (see *e.g., Adams Mfg. Co.* v. *Storen,* 304 U. S. 307 [1937]; *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 439 [1938]; *Nippert* v. *Richmond,* 327 U. S. 416 [1945]), or to tax the borrowing power of the United States (*Society for Savings* v. *Bowers,* 349 U. S. 143 [1954]; *Free* v. *Bland,* 369 U. S. 663 [1962]); or to tax in the extremely narrow area, and limited in scope, in the field of implied immunity and then solely with respect to true instrumentalities of the United States (see cases cited herein). And even in this last area, the power of Congress to *create* a tax immunity is narrowly defined. It stems not from the "nature of the agency" but solely from "the power to preserve and protect functions validly authorized" on behalf of the Federal Government which is derived from "the power to make all laws necessary and proper for carrying into execution the powers vested in Congress, U. S. Const., Art. I, § 8, cl: 18" (see *e.g., Pittman's Home Owners' Corp., supra,* 308 U. S. 21, 33; *Carson* v. *Roane-Anderson Co., supra,* 342 U. S. 232, 234).

But as is the case with the taxing power of the States over interstate commerce, which the Constitution does not intend to immunize from carrying its fair share of the costs of State government in return for the benefits it derives from within the State, in any event (see *e.g., Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450 [1958]; *Scripto* v. *Carson,* 362 U. S. 207 [1957]; *General Motors Corp.* v. *Washington,* 377 U. S. 436 [1963]), a principle

also reaffirmed below (21 N. Y. 2d 371, 372), so it is the same in the area of constitutional immunity and instrumentalities. This is also an extremely practical matter requiring accommodation and "reconciliation" (see *e.g.*, *Youngstown Co.* v. *Bowes,* 358 U. S. 534 [1958]). This, of course, was also squarely dealt with by Hamilton in his *Federalist Paper* No. 34, *ibid.*, p. 209 *et seq.* and in which he concluded (p. 215):

> "* * * '*A concurrent jurisdiction* in the article of taxation, was the only admissible substitute for an entire subordination, in respect to this branch of power of the State authority to that of the Union.' Any separation of the objects of revenue, that could have been fallen upon, would have amounted to a sacrifice of the great *interests* of the Union to the *power* of the individual States. The Convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the Federal Government, with an adequate and independent power in the States to provide for their own necessities. There remain a few other lights, in which this important subject of taxation will claim a further consideration."

Thus it is that the Tenth Amendment *yields* to the Federal Government only where its Constitutional powers are *supreme.* This was established, of course, by *McCulloch* v. *Maryland, supra.* There the Attorney General expressly contended on behalf of the United States that the States had no power under the Tenth Amendment to tax the Bank of the United States by reason of the supremacy of the United States (4 Wheat. 316, 359). This contention was specifically discussed by Mr. Chief Justice MARSHALL (*ibid.*, pp. 424-431), who then framed the issue, as follows (*ibid.*, p. 431):

> "The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the federal government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

He concluded, that the Bank of the United States was a Federal instrumentality to which the Tenth Amendment must yield. This was, of course, reaffirmed again by him, in *Osborn* v. *United States Bank*, 9 Wheat. 733 (1824), with respect to the nature of and the functions performed by the Second Bank of the United States. But at the same time, Mr. Chief Justice MARSHALL also said quite significantly as to the *distinction* between a *private business* corporation and a true Federal instrumentality (*ibid.*, pp. 361-362) as to a private business corporation:

> "* * * This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstances of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true."

and as to a Federal instrumentality:

> "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a *public corporation*, created for public and national purposes. That the *mere business of banking* is, in its own nature, *a private business*, and may be carried on by individuals or companies having no political connexion [*sic.*] with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. * * *" (Emphasis supplied.)

At the very same term of Court, Mr. Chief Justice MARSHALL in the equally historic case of *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) also reaffirmed all of the taxing powers of the States retained under the Tenth Amendment which did not interfere with the supremacy powers of the Federal Government over interstate and foreign (*ibid.*, p. 197, *et seq.*).

The doctrine of governmental immunity must be now applied against the background of these fundamental constitutional principles. It is obvious that once the *private* corporation has been removed, as here, from the embrace of the Federal arm of and the need for protective immunity, as shown above, Federal supremacy thereby *terminates* and the Congress has *no* constitutional power to either retain or to enact legislation purporting to confer immunity upon them, even though Federally chartered or licensed (see *e.g.*, *Union Pacific Railroad Co.* v. *Penniston*, 85 U. S. 5 [1873]; *Western Union Tel. Co.* v. *Mass.*, 125 U. S. 530 [1887]; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413 [1894]; *Central Pacific Railroad* v. *Calif.*, 162 U. S. 92, 125 [1895]; *Williams* v. *City of Talladega*, 226 N. Y. 404 [1912]; *Alward* v. *Johnson*, 282 U. S. 509 [1930]; *Union Bank and Trust Co.* v. *Phelps*, 288 U. S. 176 [1930]; *Broad River Power Co.* v. *Query*, 288 U. S. 178 [1932]; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization*, 288 U. S. 325 [1932]; *Susquehanna Co.* v. *Tax Comm.*, 293 U. S. 291 [1930]; and see also the opinion below 21 N. Y. 2d 357, 365-367). Congress has only this power when Federal *functions, rights,* and *property* are directly burdened; certainly not the case here; since national banks are no longer a "viable arm" of the Federal government in a constitutional sense (see, *e.g.*, *James V. Dravo Contracting Co.*, 302 U. S. 134 [1937]; *Alabama* v. *King &*

Boozer; 314 U. S. 1 [1941]; *Federal Land Bank* v. *Bismark,* 314 U. S. 95 [1941]; *Oklahoma Tax Comm.* v. *U. S.,* 319 U. S. 598 [1942]; *U. S.* v. *Allegheny Co.,* 322 U. S. 174 [1943]; *Oklahoma Tax Comm.* v. *Texas Co.,* 336 U. S. 342 [1948]; *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232 1951; *City of Detroit* v. *Murray Corp.,* 355 U. S. 489 [1957]; *U. S.* v. *City of Detroit,* 355 U. S. 466 [1957]; *U. S.* v. *Township of Muskegan,* 355 U. S. 484 [1957]; *Department of Employment* v. *U. S.,* 385 U. S. 355 [1967]).

Accordingly, we submit that Congressional legislation purporting to grant tax immunity to purely private business corporations is in direct conflict with and must *yield* to the paramount taxing powers retained by the States under the Tenth Amendment to the Federal Constitution. The imposition of the non-discriminatory sales and use taxes imposed herein are upon purely *private* retail sales entered into by purely *private* business corporations and are a valid exercise of the State's sovereign tax power which, under these circumstances, does not yield to the Federal supremacy clause of Article VI, clause 2, of the Federal Constitution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: August 26, 1969.

Respectfully submitted,

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APPENDIX A

Opinions and Decisions

DEL VECCHIO, Justice.

This controversy, by which the parties seek an adjudication as to the validity of certain sales and use taxes when applied to a national bank, is before this court for determination in the first instance, pursuant to CPLR 3222, subd. (b), par. 3.

The proceeding was originally commenced under Article 78 of the Civil Practice Law and Rules, but with the joinder of the New York State Tax Commission has been treated by the parties, and will be regarded by the court under CPLR 103(c), as a declaratory judgment action.

Petitioner is a former domestic banking corporation which was converted to a national banking association pursuant to Title 12 of the United States Code on April 19, 1963. It is located in the City of Buffalo, Erie County, New York. Respondents are the Director of the Division of Sales Tax for Erie County and the New York State Tax Commission. The Monroe County Special Tax Bureau has filed a brief *amicus curiae*.

On April 19, 1963 there was in effect in Erie County a sales tax of 1% "upon the amount of the receipts from every retail sale or sale of retail in this county of tangible personal property", which had been enacted by the Erie County Board of Supervisors in May 1947. The resolution imposing the tax provided that on each taxable sale the tax should be stated and charged separately from the sales price and shown separately on any record of the sale; that it should be "paid by the purchaser to the vendor as trustee for and on account of the county"; that the vendor should

be liable for the collection of the tax and for the tax; that when the purchaser failed to pay the tax to the vendor the purchaser should pay the tax directly to the County Sales Tax Director and file a return thereof within fifteen days after the sale. A compensating use tax was also imposed. The enabling act authorizing the Board of Supervisors to impose a sales tax provided that transactions by or with the United States, insofar as it is immune from taxation, should not be subject to any of the tax authorized. On June 2, 1964 the Erie County Board of Supervisors increased the rate of the sales and use taxes to 3%, effective July 1, 1964.

Petitioner made payments totaling $31,401.42 of sales and use taxes, and interest, under the aforementioned resolution on purchases of tangible personal property for its own use from the date of its certification as a national banking association. Its application for refund, made pursuant to the provisions of the taxing resolution, on the ground that as a national bank it is a federal instrumentality immune from such taxation, was denied by respondent Director. This proceeding was commenced to compel the refund.

Effective August 1, 1965 the State of New York enacted a sales and compensating use tax upon the receipts from the retail sale or use of tangible personal property and various services as provided in Chapters 93 and 94 of the Laws of 1965. The provisions for collection of the sales tax, except as to some details not here relevant, were substantially the same as those mentioned above concerning the Erie County tax. Prior to the commencement of this proceeding however, wherein petitioner also seeks a declaration that it is exempt from the foregoing state sales and use taxes, no payments had been made by petitioner on account of the state levies.

The question to be decided is whether the Liberty National Bank, as a purchaser, is immune from the above sales and use taxes.

Early in the history of this nation the United States Supreme Court ruled that states, and by necessary implication their governmental sub-divisions, were without authority to impose a tax upon the Bank of the United States chartered under an act of Congress. (M'Culloch v. Maryland, 4 Wheat [17 U. S.] 316, 4 L. Ed. 579.) Subsequently in Owensboro National Bank v. City of Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850, the court considered in detail the immunity from state and local taxation of national banks, holding that such instrumentalities were not subject to such taxation except when and as permitted by legislation of Congress. Referring to section 5219 of the Revised Statutes, which authorized the taxation of shares of stock in a national bank and real estate of the bank, the court said: "This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax, therefore, which is in excess of, and not in conformity to, these requirements, is void." (p. 669, 19 S. Ct. p. 539) (See also People *ex rel.* Hanover National Bank of City of New York v. Goldfogle, 234 N. Y. 345, 349, 137 N. E. 611, 612.)

Although R.S. § 5219, as amended, 12 U. S. C. § 548, has somewhat enlarged the area of state taxation of national banks, it contains no reference to sales or use taxes such as are here under consideration and respondents do not assert any power to tax based upon this section. The contention is made rather that because of a change in the

nature of national banks since the days of McCulloch and Owensboro, and because of a trend apparent in federal case law to limit the doctrine of implied delegated immunity, this court should now hold that national banks have become subject to taxation beyond the limits provided by the act of Congress. However, as recently as 1939 the Supreme Court, although recognizing that "the national bank's usefulness as an agency to provide for currency has diminished markedly", nevertheless reiterated that its banking operations are free from state taxation except as Congress may permit. (Colorado Nat. Bank of Denver v. Bedford, 310 U. S. 41, 48, 50, 60 S. Ct. 800, 803, 84 L. Ed. 1067; see also Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 107, 44 S. Ct. 23, 68 L. Ed. 191). In Michigan National Bank v. State of Michigan, 365 U. S. 467, 81 S. Ct. 659, 5 L. Ed. 2d 710, decided in 1961, the court had occasion to pass upon the validity of a state tax on national bank shares. It was there said, "The *sole authorization* upon which Michigan's Act No. 9 (the state taxing statute) may rest in § 5210" (emphasis supplied), thus reaffirming the principle that national banks are not generally subject to state taxation. (p. 470, 81 S. Ct. p. 661.)

[1, 2] With regard to the limitation of the doctrine of implied delegated immunity, it has been recognized that the recent curtailment in this area is confined to involvement of persons and corporations (most frequently, contractors dealing with the United States Government. "But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possession, institutions and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." (United States v. Allegheny County, 322 U. S. 174, 177, 64 S. Ct. 908, 911, 88 L. Ed. 1209.)

In view of the authorities discussed above, this court is bound to conclude that a state of local subdivision thereof is without power to impose a sales or use tax upon a national bank. Such power can only be conferred by Congress.

[3, 4] Respondents' assertion that the New York State and Erie County sales and use taxes in question are not taxes upon petitioner bank but are taxes imposed on the vendor is without merit. It is the legal incidence, rather than the economic burden, (although in this case these seem to fall upon the same party to the sale) which is determinative of this issue. (State of Alabama v. King & Boozer, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3; Curry v. United States, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9.) The Court of Appeals of this state has held that the incidence of a sales tax similar to those now under consideration is upon the purchaser. (Matter of Fifth Avenue Building Co. v. Joseph, 297 N. Y. 278, 284, 79 N. E. 2d 22, 24-25; Matter of Kesbec, Inc. v. McGoldrick, 278 N. Y. 293, 297, 16 N. E. 2d 288, 289.)

[5] We are aware that, when the question of the validity of a state taxing statute falling upon a United States government institution, instrumentality or activity is involved, the determination of the legal incidence of the tax as made by the highest court of the state is not controlling. (Society for Savings in City of Cleveland, Ohio v. Bowers, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 950; Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546.) In this circumstance, the United States Supreme Court is the final arbiter of legal incidence. However, the conclusion reached by the Court of Appeal is in accord with the view expressed by the Supreme Court in Kern-Limerick, Inc. v. Scurlock, *supra,* and other similar cases where it has

been held that a sales or service tax which by its terms must be passed on to the purchaser, separately stated, has its legal incidence on the purchaser. (Colorado Nat. Bank v. Bedford, *supra;* State of Alabama v. King & Boozer, *supra;* McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.)

Accordingly, we conclude that the sales and use taxes here in question could not lawfully be imposed on receipts from sales and services made or rendered to petitioner bank subsequent to April 19, 1963 and that it should be entitled to a refund of $31,401.42, the amount of such taxes including interest paid by it after that date, plus interest thereon.

Submitted controversy unanimously determined in favor of petitioner without costs.

WILLIAM, P. J., and BASTOW, GOLDMAN and HENRY, JJ., concur.

KEATING, Judge.

The question presented for our consideration is whether the Liberty National Bank and Trust Company is an instrumentality of the United States Government and, therefore, as a purchaser, is immune from sales and use taxes imposed by the State of New York and the County of Erie.

There is no dispute with regard to the applicable constitutional law—the rule is clear that the Government of the United States, its agencies and instrumentalities may not be subjected to taxation by State and local governments, absent congressional consent. (See, *e.g.,* Department of Employment v. United States, 385 U. S. 355, 87 S. Ct. 464, 17 L. Ed. 2d 414.) The question merely is whether a national bank is an instrumentality of the Federal

Government. The bank, in support of its tax-immune status, cites a long line of cases holding that a national bank is an instrumentality of the Federal Government. (See, *e.g.*, M'Culloch v. State of Maryland, 4 Wheat. [17 U. S.] 316, 4 L. Ed. 579; Osborn v. Bank of United States, 9 Wheat. [22 U. S.] 738, 6 L. Ed. 204; Owensboro Nat. Bank v. City of Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850.) We must keep in mind, however, in reviewing these cases, that what must be determined here is in essence a question of fact—"whether [the] institution is so closely related to governmental activity as to become a tax-immune instrumentality". (Department of Employment v. United States, 385 U. S. 355, 358-359, 87 S. Ct. 464, 467, *supra*.)

The cases which have held that national banks are instrumentalities of the Federal Government go back almost to the beginning of our republic and involve institutions whose activities are so different and varied that their value as precedent is open to serious question. As Mr. Justice Brandeis has written in a dissenting opinion which has since been adopted by the Supreme Court, "[T]he decision of the court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. * * * Moreover, the judgment of the court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned. In cases involving constitutional issues of the [kind presented here], this court must, in order to reach sound conclusions, feel free to bring its opinions into agree-

ment with experience and with facts newly ascertained, so that its judicial authority may * * * 'depend altogether on the force of the reasoning by which it is supported.' " (Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 412-413[1] 52 S. Ct. 443, 449, 76 L. Ed. 815; see, also, Smith v. Allwright, 321 U. S. 649, 656, 64 S. Ct. 757, 88 L. Ed. 987.)

The leading case in this area and a landmark decision in America jurisprudence is M'Culloch v. State of Maryland (*supra*). It was in this case that the Supreme Court upheld the power of Congress to charter a national bank and, in addition, held that the bank thus created was subject to immunity from taxation "on [its] operations" (4 Wheat. [17 U. S.] 436).

The national bank involved in M'Culloch v. State of Maryland (*supra*) and Osborn v. Bank of United States (*supra*) was one in which the Federal Government subscribed to and owned 20% of the capital stock. The President of the United States had the power to appoint 5 of the 25 members of the Board of Directors and the Government participated in the election of the remaining directors. The Secretary of the Treasury was required to deposit all Federal moneys in the bank and the bank was required to transmit funds for the Federal Government without charge. Moreover, paper currency *issued by the bank* was made legal tender for the purpose of paying all debts owing to the Federal Government, and the bank acted as a fiscal agent for the United States and handled its foreign exchange transactions (see, generally, Studenski and Kroos, Financial History of the United States [1952], pp. 83-88, 103-106).

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[1] The majority opinion from which Mr. Justice Brandeis dissented as well as the precedent which he would have no longer followed were overruled in Helvering v. Mountain Producers Corp., 303 U. S. 376, 387, 58 S. Ct. 623, 82 L. Ed. 907. The issue in those cases involved a question of the amenability of government instrumentalities to taxation. The court ultimately determined that leases of State-owned property—contrary to prior decision—were not instrumentalities of the State.

It was in this context that Chief Justice Marshall noted that the bank was "the great instrumentality by which the fiscal operations of the government are effected" (Osborn v. United States, 9 Wheat. [22 U. S.] 738, 860, *supra*), and was thus immune from discriminatory taxes which hostile State governments sought to levy.[2]

In striking down these taxes which were designed to destroy and hamper an institution which was clearly an instrumentality of the National Government, Chief Justice Marshall wrote in M'Culloch v. State of Maryland (*supra*, 4 Wheat. [17 U. S.] pp. 436-437): "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

The charter of the national bank with which *M'Culloch* and *Osborn* dealt expired in 1836—no such bank with similar functions has been chartered by Congress since that period. The next major congressional action with regard to national banks came during the Civil War period with the enactment of the National Bank Acts of 1863-1864. While the relationships of national banks to the government under the statute was not as close as that of the

[2] In M'Culloch v. State of Maryland (*supra*) the State sought to tax the currency issued by the national bank—a tax on the very performance of a governmental function and in *Osborn* the State imposed a $50,000 tax on each office. In both instances the tax was blatantly discriminatory as no similar tax was imposed on State banks.

earlier Bank of America, they, nevertheless, were actively engaged in the governmental function of issuing notes which served as the Nation's currency. It was this national bank system which the Supreme Court dealt with in Owensboro Nat. Bank v. City of Owensboro, 173 U. S. 664, 19 S. Ct. 537, *supra*. In that case the court struck down a tax on the intangible property of a national bank—a tax which was also allegedly discriminatory in some respects (*supra*, p. 665, 19 S. Ct. 537).

In *Owensboro* and subsequent cases which have followed, the court has continued to rely on M'Culloch v. State of Maryland and Osborn v. Bank of United States without undertaking *de novo* examinations of the functions of the bank in each instance. (See *e.g.*, First Nat. Bank of Guthrie Center v. Anderson, 269 U. S. 341, 46 S. Ct. 135, 70 L. Ed. 295 [1926]; First Nat. Bank of Hartford, Wis. v. City of Hartford, 273 U. S. 548, 47 S. Ct. 462, 71 L. Ed. 767 [1927]; Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 52 S. Ct. 133, 76 L. Ed. 265 [1931]; Colorado Nat. Bank of Denver v. Bedford, 310 U. S. 41, 60 S. Ct. 800, 84 L. Ed. 1067 [1940]; see, also, People *ex rel.* Bridgeport Sav. Bank v. Feitner, 191 N. Y. 88, 83 N. E. 592 [1908]; People *ex rel.* Hanover Nat. Bank, etc. v. Goldfogle, 234 N. Y. 345, 137 N. E. 611 [1922].) While such reliance may have been justified during the period when national banks continued to issue currency—a function which terminated in 1935, we believe the time has come when the tax-immune status of national banks must be re-examined in light of both their present-day function as well as other Supreme Court decisions which have set forth criteria for making determinations similiar to that which we are required to make here.

An examination of the Supreme Court's decisions in this area reveals a general curtailment of the class of

instrumentalities which are viewed as tax immune. The court appears to be placing greater stress upon the nature of the tax and its actual effect upon the furtherance of the governmental functions involved rather than relying upon a "mechanical application of the rule that government instrumentalities are immune from taxation". (Educational Films Corp. of America v. Ward, 282 U. S. 379, 391-392, 51 S. Ct. 170, 173, 75 L. Ed. 400.)[3]

The earliest and most significant of these decisions is Union Pacific Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5, 21 L. Ed. 787 (1873). In that case the *Union Pacific Railroad Company, a corporation chartered by Congress,* challenged a tax laid upon its property by a subdivision of the State of Nebraska. The Supreme Court proceeded first to consider the arguments advanced in support of the railroad's argument that it was an instrumentality of the United States to the extent that it was entitled to the same tax immunity as the government itself:

"It is insisted on behalf of the plaintiffs that the tax of which they complain has been paid upon an agent of the General government constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privi-

[3] "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principal of constitutional construction, be narrowly restricted. For the expansion of the immunity of one government correspondingly curtails the sovereign power of the other to tax". (Graves v. People of State of New York *ex rel.* O'Keefe, 306 U. S. 466, 483, 59 S. Ct. 595, 600, 83 L. Ed. 927.)

leges conferred upon it, upon condition that it should at all times transmit dispatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which

the company assumed, the engagements to which we have already alluded.

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?" (pp. 31-32).

The court proceeded to answer the question in the negative. It rejected the argument that, merely because the corporation received its charter from the Federal Government, it was a tax immune instrumentality and it outlined the dangers which would result if all those private corporations which performed services for the government were exempt from State taxation: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stagecoaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from lia-

bility to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited" (p. 33).

The court held that, as long as the tax did not interfere with the performance of the function served by the private corporation involved, it was not *impliedly immune* from the State taxation.

The *Peniston* case was followed in Broad Riv. Power Co. v. Query, 288 U. S. 178, 53 S. Ct. 326, 77 L. Ed. 685, in which the court upheld a tax on the production and sale of electricity generated by a hydroelectric company which constructed and operated its plant by permission and under supervision of the Federal Government. The court, speaking through Chief Justice Hughes, wrote (pp. 180-181, 53 S. Ct. p. 327): "It is apparent, however, that the complainant, in generating and selling power, is not acting as an agent for the government. It acts with the government's permission, and, while it may be said to have received a privilege from the government, it is not a privilege to be exercised on behalf of the government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function. * * * The tax is not laid upon the license granted by the Federal Water Power Commission, but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing

and selling an article of trade. * * * The product is property. The fact that a privilege has been received from the federal government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid." (See, also, Williams v. City of Talladega, 226 U. S. 404, 416, 33 S. Ct. 116, 57 L. Ed. 275; Western Union Tel. Co. v. Commonwealth of Massachusetts, 125 U. S. 530, 549, 8 S. Ct. 961, 31 L. Ed. 790; Alward v. Johnson, 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496; Indian Territory Illuminating Oil Co. v. Board of Equalization, 288 U. S. 325, 53 S. Ct. 388, 77 L. Ed. 812.)

It is clear from the cases cited and discussed that privately owned and operated business enterprises which perform services for the government and/or exist and operate by virtue of a Federal charter or franchise are not *per se* immune from nondiscriminatory State taxation which does not impede the performance of their service for government or the privilege granted by the government charter or franchise. As Justice Stone wrote in upholding a New York State nondiscriminatory tax upon a corporate franchise, notwithstanding the inclusion of tax exempt income in the measure of it: "This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference

by the other." (Educational Films Corp. of America v. Ward, 282 U. S. 379, 391-392, 51 S. Ct. 170, 173, 75 L. Ed. 400; see, also, Reconstruction Fin. Corp. v. Beaver County, Pa., 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172; *cf.* United States v. Yazell, 382 U. S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404.)

We turn then to the original question posed—given the background of the cases upon which the Liberty National Bank and Trust Company relies and the further decisions of the Supreme Court in defining instrumentalities for tax immunity purposes, is the bank entitled to a constitutionally implied immunity from State taxation as an instrumentality of the Federal Government? We conclude that the answer is that it clearly is not.

National banks, though federally chartered, are privately owned and operated primarily for the private benefit of their owners. Like State chartered banks, they are depositories for Federal funds—indeed, legislation forbids discrimination for that purpose between State and national banks which are members of the Federal Reserve System (U. S. Code, tit. 12, § 265).[4] In addition, like any private enterprise or individual engaging in activities affected with a public interest, they are subject to severe Government regulation. This regulation, accomplished via membership in the Federal Reserve System (membership which is open to State banks on a voluntary basis [U. S. Code (1964) tit. 12 § 321]), is, however, hardly sufficient to render national banks instrumentalities of the Federal Government so as to entitle them to the same immunity from taxation as the Government itself. (Union Pacific Railroad Co. v. Penis-

[4] Over one fourth of all moneys subject to Federal Reserve System Regulation are in such State chartered banks. (National Summary of Accounts and Deposits in All Commercial Banks, Federal Deposit Insurance Corporation, June 30, 1966.)

ton, *supra;* Broad Riv. Power Co. v. Query, *supra;* Western Union Tel. Co. v. Commonwealth of Massachusetts, *supra; cf.* Spevack v. Klein, 385 U. S. 511, 520, 87 S. Ct. 625, 630, 17 L. Ed. 2d 574 [concurring opn. of Fortas, J.]).

Moreover, we are dealing here with a nondiscriminatory tax, immunity from which, it is conceded, will give national banks no more than an "imperceptible economic advantage" (respondent's brief, p. 18) over their State competitors and we assume, conversely, that nonimmunity from the tax will have little or no effect on their operations or the services they perform for the Government. Under these circumstances, we see no basis in law or logic for immunizing national banks from the taxation with which we are concerned here.

Such cases as Colorado Nat. Bank of Denver v. Bedford, 310 U. S. 41, 60 S. Ct. 800, 84 L. Ed. 1067, *supra* and Department of Employment v. United States, 385 U. S. 355, 87 S. Ct. 464, 17 L. Ed. 2d 414 *(supra)* upon which the bank relies do not conflict with this conclusion.

In the *Colorado Nat. Bank* case the Supreme Court held that, in the absence of contrary legislation by Congress, a State law laying a percentage tax on the users of the safety deposit services of banks measured by the banks' charges for the services, and requiring the banks to collect the taxes and account for them to the State and include them in their bills for the services, was valid.

The case was decided in 1940, and the court recognized that the national bank's usefulness as an agency to provide for currency "has diminished markedly" (310 U. S. p. 48, 60 S. Ct. 800) and merely *assum[ed]* * * * that its banking operations are free from state taxation except as Congress may permit" (p. 50, 60 S. Ct. p. 804; emphasis

added). The basis of the court's decision was that the tax was not on the bank as the owner of the safe deposit box but rather that it was upon the customer as the user. If the tax had been upon the bank as the owner of the box, the bank would have passed the tax on to the customer and, since it was responsible for the collection of the tax in any event, it becomes rather clear that the distinction drawn by the court was one without a difference.

The court went on to note significantly that the burden placed upon the bank to collect and remit the tax did not pose an unconstitutional burden.

In light of the court's language as well as the result reached, we cannot agree that this case precludes us from reconsidering prior case law. Indeed, highly technical distinctions of the kind made by the court in deciding this case, in areas badly in need of re-examination, have often been preludes to the ultimate rejection of old and no longer rational precedent. (Compare Goldman v. United States, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, and Silverman v. United States, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734, with Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576.)

The reasoning of the second case relied on by the bank clearly supports our conclusion regarding the status of national banks. In Department of Employment v. United States *(supra)* the court held that the American National Red Cross was a tax-immune instrumentality of the Federal Government. The court's analysis is significant and instructive. Mr. Justice Fortas, speaking for the court, wrote (385 U. S., *supra*, pp. 358-360, 87 S. Ct. p. 467): "Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross

is clearly such an instrumentality * * * Congress chartered the Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit * * * Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors * * * By statute and Executive Order there developed upon the Red Cross the right and obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status as an arm of the Government."

The contrast between activities and functions of the American National Red Cross and that of the Liberty National Bank and Trust Company is so striking that no further elaboration is required.

We must note, however, as the bank points out, that there is dictum in the Red Cross opinion which supports its contention on this appeal. Thus the court wrote (p. 360, 87 S. Ct. p. 467): "In those respects in which the Red Cross differs from the usual government agency—*e.g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g.*, national banks—whose status as tax immune instrumentalities of the United States is beyond dispute."

If the Supreme Court had dealt with the precise problem with which we are concerned here—namely the status of national banks—we would, of course, follow that decision without question. We believe that the court's reference to national banks is clearly understandable in the context in which it was rendered, since the precedents cited and discussed earlier have never been rejected and the status of national banks as tax-immune instrumentalities was not disputed in that case. It is obvious, however, that the *reasoning* of the court's decision and its holding squarely support the position we take here and the similar position recently taken by the Supreme Judicial Court of Massachusetts (First Agric. Nat. Bank of Berkshire County v. State Tax Comm., 229 N. E. 2d 245 [Mass. 1967]). Until the Supreme Court holds that *national banks of today* are to be deemed immune from contributing their fair share of the taxes necessary to enable State and local governments to provide the essential services from which the banks themselves benefit, we decline to do so.

We, of course, recognize that, even though the bank is not automatically entitled to a constitutional immunity from taxation, Congress has the power to immunize national banks and other federally chartered institutions from this type of taxation. There is, however, no such statute presently in effect.

Section 548 of title 12 of the United States Code, the only Federal statute dealing with State taxation of national banks, is merely designed to insure that the inherent taxing powers which were recognized in M'Culloch v. State of Maryland (*supra*)—*e.g.*, the power to tax the real property of the banks as well as the privately owned shares—be exercised in a nondiscriminatory fashion. As the Supreme Court recently wrote: "Congress enacted the Sec-

tion in 1864 and this Court has passed on it over 55 times in the near century of the Section's existence. During that period the Court has kept clearly in view, as was said in the last case in which it wrote, that 'the various restrictions [§ 548] * * * places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class.' '' (Michigan Nat. Bank v. State of Michigan, 365 U. S. 467, 472-473, 81 S. Ct. 659, 662, 5 L. Ed. 2d 710.)

There is nothing whatever in the statute which indicates an intent to immunize national banks from nondiscriminatory State taxation such as this and "[T]he immunity formerly said to exist on constitutional implication cannot now be resurrected in the form of statutory implication" (Oklahoma Tax Comm. v. United States, 319 U. S. 598, 604, 63 S. Ct. 1284, 1286, 87 L. Ed. 1612). "If it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." (Graves v. People of State of New York *ex rel.* O'Keefe, 306 U. S. 466, 480, 59 S. Ct. 595, 598, 83 L. Ed. 927, *supra;* see, also, Oklahoma Tax Comm. v. Texas Co., 336 U. S. 342, 365-366, 69 S. Ct. 561, 93 L. Ed. 721.)

We note in conclusion that the problems which face State and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money. The Liberty National Bank and Trust Company has not presented us with a single rational argument, aside from a string of cases which were relevant in another time and under different circumstances, why it should not, like any other individual or business enterprise, contribute to the costs. We perceive none.

We wish to take special note of the exceptionally well-written and researched briefs submitted by both parties.

The order of the Appellate Division upholding the tax immune status of the Liberty National Bank and Trust Company should be reversed, with costs, and the petition should be dismissed.

Fuld, C. J., and Van Voorhis, Burke, Scileppi, Bergan and Breitel, JJ., concur.

Order reversed, etc.

(Same Title.)

APPELLATE DIVISION—FOURTH DEPARTMENT

26 A. D. 2d 97 [1967]
Copy opinion here.
(per del Vecchio)

#1

(Same Title.)

COURT OF APPEALS

21 N. Y. 2d 357 [1967]; 235 N. E. 2d 101
Copy opinion here
(per Keating)

#2

(Same Title.)

UNITED STATES SUPREME COURT
Dismissal Under Rule 60.
393 U. S. 929 (1968)

No. 175. Liberty National Bank & Trust Co. v. Buscaglia, Director, Division of Sales Tax, Erie County, *et al.* Appeal from Ct. App. N. Y. Appeal dismissed pursuant to

Rule 60 of the Rules of this Court. *Manly Fleischmann* for appellant. Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Robert W. Bush,* Assistant Attorney General, for appellees. Reported below: 21 N. Y. 2d 357, 235 N. E. 2d 101.

(Same Title.)

COURT OF APPEALS

23 N. Y. 2d 933; 246 N. E. 2d 361

Upon reargument: Order affirmed, without costs, upon the constraint of recent Supreme Court decisions (*Dickinson* v. *First Nat. Bank of Homestead,* 393 U. S. 409, decided Jan. 20, 1969; *First Agric. Nat. Bank of Berkshire County* v. *State Tax Comm.,* 392 U. S. 339). No opinion.

Concur: Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Keating, Breitel and Jasen.

(Same Title.)

25 N. Y. 2d __; __ N. E. 2d __

Motion for reargument denied.

Motion to amend the remittitur denied upon the ground that the decision of the Court of Appeals (23 N. Y. 2d 933) indicates the federal questions necessarily passed upon (*cf. People* v. *Baker,* 23 N. Y. 2d 898).

APPENDIX B

Orders and Judgments

ORDER OF INTERVENTION AND TRANSFER.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie, at the Erie County Hall in the City of Buffalo, New York, on the 6th day of January, 1966.

Present: Hon. William B. Lawless, *J. S. C.*,
Justice Presiding.

—o—

In the Matter of the Application
of
LIBERTY NATIONAL BANK AND TRUST COMPANY, for a Final Judgment pursuant to Article 78 of the Civil Practice Law and Rules compelling the Director, Division of Sales Tax, County of Erie, to refund taxes illegally collected,

Petitioner,

v.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie,

Respondent.

Index No. .....

—o—

LIBERTY NATIONAL BANK AND TRUST COMPANY, petitioner herein, having applied to this Court by petition verified on October 13, 1965, and amended petition

verified on January 6, 1966, for a final judgment pursuant to Article 78 of the Civil Practice Law and Rules compelling respondent, the Director, Division of Sales Tax, County of Erie, to order a refund of retail sales and compensating use taxes erroneously, illegally and unconstitutionally collected from petitioner, and having given due notice in writing to respondent of the application for such relief, and the proceeding having come on to be heard on the return day named in said notice, and respondent having duly served on petitioner a verified answer and verified amended answer denying that the taxes in question have been erroneously, illegally and unconstitutionally collected, and the attorneys for the above named parties, and Louis J. Lefkowitz, Attorney General of the State of New York, acting for and on behalf of the State Tax Commission, having stipulated that the State Tax Commission intervene as a necessary party herein and that this proceeding be transferred for initial disposition to the Appellate Division, Fourth Judicial Department,

NOW, on reading and filing said petition, amended petition and answer and amended answer and the supporting affidavits of J. G. Schmauss, together with the exhibits annexed thereto in support of said application and it appearing therefrom that the issue raised by said petition, amended petition, answer, affidavits and exhibits is whether the determination of the respondent, made as a result of a hearing held pursuant to direction by law, is supported by substantial evidence, and upon reading and filing the stipulation entered into between the attorneys for petitioner and respondent herein and the Attorney General of the State of New York, and after hearing William D. Schultz, of counsel for petitioner, and John S. Ryan, attorney for respondent, both in support of this application,

and on motion of Jaeckle, Fleischmann, Kelly, Swart & Augspurger, attorneys for petitioner, and upon the consent of John S. Ryan, attorney for respondent, and upon the consent of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the State Tax Commission, it is

ORDERED, that the State Tax Commission be and the same hereby is made a necessary party to this litigation pursuant to Section 7802 of the CPLR, and it is further

ORDERED, that this proceeding be and the same hereby is transferred for initial disposition to a term of the Appellate Division of the Supreme Court, Fourth Judicial Department, to be held at Rochester, New York, on the 15th day of February, 1966, pursuant to Sections 7803 and 7804 of the Civil Practice Law and Rules.

Dated: January 6, 1966.

Enter.

WILLIAM B. LAWLESS,
J. S. C.

Granted,
Jan. 6, 1966.
R. E. Byron,
Sp. Dep. Clerk.

ORDER OF APPELLATE DIVISION.

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 9th day of May, 1966.

Present: Hon. Alger A. Williams, *Presiding Justice.*
" Earle C. Bastow,
" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio, *Associate Justices.*

———o———

LIBERTY NATIONAL BANK AND TRUST COMPANY,
Petitioner,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,
Respondents.

———o———

The above named petitioner having on October 13, 1965, instituted a special proceeding under Article 78 of the Civil Practice Law and Rules and an Order having been entered in Supreme Court, Erie County, on the 6th day of January, 1966, making the State Tax Commission a necessary party to this litigation, and transferring the proceeding to this Court for initial disposition, and the parties above named having thereafter submitted the controversy herein under the provisions of CPLR, Rule 3222, and having filed a case containing an agreed statement of the facts upon which

said controversy is based, dated February 8, 1966, in the office of the Clerk of the County of Erie and having filed said statement in the office of the Clerk of this Court on the 20th day of April, 1966, and having stipulated that said agreed statement of facts supersedes and takes the place of the pleadings in this proceeding,

Now, after hearing Mr. Alan H. Vogt, of counsel for the petitioner, and Mr. Robert W. Bush, of counsel for the respondent, State Tax Commission, and Mr. John S. Ryan, of counsel for the respondent, William K. Buscaglia, and Mr. William M. Weegar, having submitted as counsel for the Monroe County Special Tax Bureau, *amicus curiae,* and due deliberation having been had thereon,

The submitted controversy is hereby unanimously determined in favor of petitioner, without costs, and

It is hereby ORDERED, ADJUDGED and DECREED, That the sales and use tax here in question could not lawfully be imposed on receipts from sales and services made or rendered to petitioner bank subsequent to April 19, 1963 and that the respondent, William K. Buscaglia, as Director Division of Sales Tax, County of Erie, forthwith refund to petitioner the sum of $31,401.42, plus interest thereon.

Opinion by Del Vecchio, *J.,* which is hereby made a part hereof.

Enter.

LESTER A. FANNING.

Entered: the 17th day of June, 1966.
Lester A. Fanning,
Clerk.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 17th day of June 1966.

LESTER A. FANNING,
Clerk.

NO.203

ORDER OF REVERSAL BY THE COURT OF APPEALS.

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,
The Hon. Stanley H. Fuld, Chief Judge, *Presiding.*
Raymond J. Cannon, *Clerk.*
Remittitur December 29, 1967.

—o—

4. No. 203 67

LIBERTY NATIONAL BANK AND TRUST COMPANY,
Respondent,

vs.

WILLIAM K. BUSCAGLIA, as Director Division of Sales Tax, County of Erie, and New York State Tax Commission,
Appellants.

—o—

BE IT REMEMBERED, That on the 25th day of April, in the year of our Lord, one thousand nine hundred and sixty-seven, William K. Buscaglia, as Director, Division of Sales Tax, County of Erie, and New York State Tax Commission, the appellants in this cause, came here unto the

Court of Appeals, by Norman A. Stiller, and Louis J. Lefkowitz, Attorney General, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Liberty National Bank and Trust Company, the respondent—in said cause, afterwards appeared in said Court of Appeals by Jaeckle, Fleischmann, Kelly, Swart & Augspurger, its attorneys.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert W. Bush, of counsel for the appellant Commission, and by Mr. Milton S. Weisberg, of counsel for the appellant Buscaglia, and by Mr. Alan H. Vogt, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the petition dismissed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Fourth Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Fourth Judicial Department, before the Justices thereof, according to the form of the statute in

such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, December 29, 1967. } ss.:

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

ORDER OF THE APPELLATE DIVISION.

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

Present: Goldman, P. J.,
Del Vecchio,
Bastow,
Henry, JJ.

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE COMMISSION,

Respondents.

This Court having entered an Order on the 12th day of March, 1968 making the judgment of the Court of Appeals dismissing the petition herein the judgment of this Court, and the said Court of Appeals having thereafter granted a reargument of the appeal, and upon reargument having on February 19, 1969 affirmed, without costs, the Order of this Court entered June 17, 1966 and having ordered that the record and the proceedings in the Court of Appeals be remitted to this Court to be proceeded upon according to law;

NOW, upon reading the remittitur of the Court of Appeals, the affidavit of Manly Fleischmann sworn to the 19th day of March, 1969, the notice of motion, together with proof of due service on the attorneys for the respondents, and no one appearing in opposition thereto,

It is hereby ORDERED, That the judgment of the Court of Appeals entered February 19, 1969 be, and the same hereby is made the judgment of this Court.

Entered:

April 3, 1969.

LESTER A. FANNING,
Clerk.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 3rd day of April, 1969.

(Seal)

LESTER A. FANNING,
Clerk.

ORDER OF SUPREME COURT OF THE UNITED STATES.

1968—November 1. The foregoing motion to dismiss the appeal in this case having been filed with the Clerk on October 17, 1968, and after a period of fifteen days, no opposition thereto having been filed by counsel for the appellees, and no costs or fees due the Clerk, the appeal is now here dismissed, pursuant to the 60th Rule of this Court.

JOHN F. DAVIS,
(SEAL) *Clerk of the Supreme Court of the United States,*

BY /s/ E. P. CULLINAN,
Chief Deputy.

A true copy
Test:
John F. Davis,
Clerk of the Supreme Court of the United States,
By E. P. Cullinan,
Chief Deputy.

ORDER FOR REARGUMENT BY THE COURT OF APPEALS.

STATE OF NEW YORK—In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the tenth day of October A. D. 1968.

Present: Hon. Stanley H. Fuld, *Chief Judge, presiding.*

—o—

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Respondent,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Appellants.

Mo. No. 878.

—o—

A motion for a reargument of the above cause having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for argument during the November, 1968 session of this Court.

A copy

(SEAL)

GEARON KIMBALL,
Deputy Clerk.

ORDER FOR REARGUMENT BY THE COURT OF APPEALS.

STATE OF NEW YORK—In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twentieth day of November A. D. 1968.

Present: Hon. Stanley H. Fuld, *Chief Judge, presiding.*

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Respondent,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Appellants.

Mo. No. 1171.

A motion having heretofore been made herein upon the part of the appellants for an extension of the time within which to reargue the above cause pursuant to this Court's order of October 10, 1968 granting a motion for reargument, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for reargument during the January, 1969 session of this Court.

A copy

(SEAL)

GEARON KIMBALL,
Deputy Clerk.

ORDER OF AFFIRMANCE BY THE COURT OF APPEALS

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of February in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

Witness,
The Hon. Stanley H. Fuld, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.
Remittitur February 19, 1969.

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Respondent,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Appellants.

No. 203.

BE IT REMEMBERED, That on the 25th day of April in the year of our Lord one thousand nine hundred and sixty-seven, William K. Buscaglia, as Director, Division of Sales Tax, County of Erie, and New York State Tax

Commission the appellants in this cause, came here unto the Court of Appeals, by Norman A. Stiller, and Louis J. Lefkowitz, Attorney General, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Liberty National Bank and Trust Company, the respondent—in said cause, afterwards appeared in said Court of Appeals by Jaeckle, Fleischmann, Kelly, Swart & Augspurger, its attorneys.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert W. Bush, of counsel for the appellant Commission and by Mr. Milton S. Weisberg of counsel for the appellant Buscaglia and by Mr. Alan H. Vogt, of counsel for the respondent—, ... and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs and the petition dismissed. And thereafter this cause having been reargued by Mr. Robert W. Bush, of counsel for the appellants, and by Mr. Manly Fleischmann, of counsel for the respondent, this Court did order and adjudge on February 19, 1969, that upon reargument the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmd, without costs, upon the constraint of recent Supreme Court decisions (*Dickinson v. First National Bank of Homestead*, ____ U. S. ____, 3 U. S. Law Week 3267, decided January 20, 1969; *First Agricultural Bank of Berkshire County v. State Tax Commission*, 393 U. S. 339).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Fourth Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that upon reargument the said order be affirmed, without costs, &c as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Fourth Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 19, 1969. } ss.:

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

ORDER OF THE APPELLATE DIVISION ON REMITTITUR.

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

Present: Goldman, P. J.,
Del Vecchio,
Bastow,
Henry, JJ.

—o—

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Respondents.

—o—

This Court having entered an Order on the 12th day of March, 1968 making the judgment of the Court of Appeals dismissing the petition herein the judgment of this Court, and the said Court of Appeals having thereafter granted a reargument of the appeal, and upon reargument having on February 19, 1969 affirmed, without costs, the Order of this Court entered June 17, 1966 and having ordered that the record and the proceedings in the Court of Appeals be remitted to this Court to be proceeded upon according to law;

NOW, upon reading the remittitur of the Court of Appeals, the affidavit of Manly Fleischmann sworn to the 19th day of March, 1969, the notice of motion, together with proof of due service on the attorneys for the respondents, and no one appearing in opposition thereto,

It is hereby ORDERED, That the judgment of the Court of Appeals entered February 19, 1969 be, and the same hereby is made the judgment of this Court.

Entered:

April 3, 1969.

LESTER A. FANNING,
Clerk.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 3rd day of April 1969.

LESTER A. FANNING,
Clerk.

JUDGMENT OF SPECIAL TERM, SUPREME COURT ON REMITTITUR.

STATE OF NEW YORK

SUPREME COURT—County of Erie

Special Term of the Supreme Court held in and for the County of Erie at the Erie County Hall, in the City of Buffalo, N. Y. on the 28th April 1969. Norman A. Stiller, *J. S. C.*

—o—

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Respondents.

Index No. C-85596.

—o—

The above named Petitioner, having on October 13, 1965 instituted a special proceeding under Article 78 of the Civil Practice Law and Rules, and an order having been entered in Special Term of the Supreme Court, Erie County on the 6th day of January, 1966, making the New York State Tax Commission a necessary party to this litigation and transferring the proceeding to the Appellate Division of the Supreme Court, Fourth Judicial Department, for initial disposition, and the parties having thereafter submitted the controversy herein under the provisions of Rule 3222 of

the Civil Practice Law and Rules and having filed a case containing an agreed statement of the facts upon which said controversy is based, dated February 8, 1966, in the Office of the Clerk of the County of Erie, and having filed said statement in the Office of the Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department, on the 20th day of April, 1966; and

The proceeding having duly been heard by the Appellate Division and the Appellate Division, by decision and order dated June 17, 1966, having determined the submitted controversy unanimously in favor of Petitioner, without costs, and the Appellate Division having Ordered, Adjudged, and Decreed that the sales and use tax here in question could not lawfully be imposed on receipts from sales and services made or rendered to Petitioner subsequent to April 19, 1963 and that the Respondent, William K. Buscaglia, as Director, Division of Sales Tax, County of Erie, forthwith refund to Petitioner the sum of $31,401.42, plus interest thereon; and

An appeal having been taken from said order to the Court of Appeals and the proceeding having duly been heard by the Court of Appeals and the Court of Appeals, by remittitur dated December 29, 1967, having reversed the order of the Appellate Division of the Supreme Court, Fourth Judicial Department, and having Ordered and Adjudged that the Petition herein be dismissed, with costs; and

An order having been entered in the Appellate Division of the Supreme Court, Fourth Judicial Department, on March 12, 1968, ordering that the judgment of the Court of Appeals dismissing the petition be made the judgment of the Appellate Division; and

Thereafter, the Court of Appeals, by its order dated October 10, 1968, having granted reargument of this cause; and

The proceeding upon reargument having duly been heard by the Court of Appeals and the Court of Appeals, by its remittitur dated February 10, 1969, having Ordered and Adjudged that the order of the Appellate Division of the Supreme Court, Fourth Judicial Department, appealed from be affirmed, without costs, and the Court of Appeals having remitted the record and the proceedings to the Appellate Division of the Supreme Court, Fourth Judicial Department; and

The proceedings having duly been heard by the Appellate Division of the Supreme Court, Fourth Judicial Department, and the Appellate Division, *by decision and order* dated April 3, 1969, having ordered that the judgment of the Court of Appeals entered February 19, 1969, be made the judgment of the Appellate Division; and

Certified copies of all of the aforesaid orders having been duly filed in the office of the Clerk of the County of Erie, and the Record herein and the Notice of Motion and Affidavit of Manly Fleischmann, having been read and filed;

NOW on motion of Jaeckle, Fleischmann, Kelly, Swart & Augspurger (Manly Fleischmann, Esq., of Counsel), attorneys for the Petitioner, it is

ADJUDGED, that the Petitioner, Liberty National Bank and Trust Company, as a national banking association, is an instrumentality of the United States government and immune, insofar as it is a purchaser, from the payment of the retail sales and compensating use taxes imposed by the County of Erie and the State of New York, and it is further

ADJUDGED, that the sales and use tax here in question could not lawfully be imposed on receipts from sales and services made or rendered to Petitioner bank subsequent to April 19, 1963, and it is further

ADJUDGED, that the Respondent, William K. Buscaglia, as Director, Division of Sales Tax, County of Erie, forthwith refund to Petitioner, Liberty National Bank and Trust Company, the sum of $31,401.42, plus interest thereon in the sum of $4,132.88, making a total sum for judgment of $35,534.30, and that the Petitioner have execution therefor.

JUDGMENT, signed and entered this 28th day of April, 1969.

NORMAN A. STILLER, J. S. C.,
Justice of the Supreme Court.

Enter:
Granted,
April 28, 1969.
Madelyn Wipperman,
Spec. Dep. Clerk.

Judgment signed and filed this 28 day of April, 1969.

ROBERT GRIMM,
Clerk.

ORDER DENYING ARGUMENT AND AMENDMENT TO REMITTITUR BY THE COURT OF APPEALS.

STATE OF NEW YORK—In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of June A. D. 1969.

Present: Hon. Stanley H. Fuld, *Chief Judge, Presiding.*

—o—

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Respondent,

vs.

WILLIAM K. BUSCAGLIA, as Director, Division of Sales Tax, County of Erie, and NEW YORK STATE TAX COMMISSION,

Appellants.

Mo. No. 594.

—o—

A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied insofar as it seeks reargument, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is denied upon the ground that the decision of the Court of Appeals (23 N. Y. 2d 933) indicates the federal questions necessarily passed upon *cf. People v. Baker,* 23 N. Y. 2d 898).

A copy.

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

APPENDIX C

Statutes Involved

PERTINENT PROVISIONS OF NEW YORK TAX LAW ARTICLE 28, LAWS OF 1965 CHAPTER 93

* *

§ 1105. IMPOSITIONS OF SALES TAX

On and after August first, nineteen hundred sixty-five, there is hereby imposed and there shall be paid a tax of two percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) The receipts from every sale, other than sales for resale of gas, electricity, refrigeration and steam, and gas, electric refrigeration and steam service of whatever nature, and from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service.

(c) The receipt from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons but excluding the furnishing of information which is personal or individual in nature and which is not or may not be sub-

stantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news.

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed.

(3) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public, and except any receipts from laundering, drycleaning, tailoring, weaving, pressing, shoe repairing and shoe shining, and except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, and except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provi-

sions, supplies, maintenance and repairs (other than with respect to articles purchased for the original equipping of a new ship); provided, however, that nothing contained in this paragraph shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service.

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings.

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision.

(d) (i) Irrespective of price, when beer, wine or other alcoholic beverages are sold, or when the charge to the patron or customer is one dollar or more for a sale of food and drink of any nature or of food alone, receipts from every such sale in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale is for consumption off the premises of the vendor, and consists of a meal, or food prepared and ready to be eaten, of a kind obtainable in restaurants as the main course of a meal, including a sandwich, except where food other than sandwiches is sold in an unheated state and is of a type commonly sold in the same form and condition in food stores other than those which are principally engaged in selling prepared foods.

(ii) The tax imposed by this subdivision shall not apply to food or drink which is sold to an air line for consumption while in flight.

(e) The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than at the rate of two dollars per day.

(f) (1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee.

(2) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year, and on the initiation fee alone, regardless of the amount of dues, if such initiation fee is in excess of ten dollars, except that the tax shall not apply to a fraternal society, order or association operating under a lodge system or any fraternal association of students of a college or university. Where the tax on dues applies to any such social or athletic club, the tax shall be paid by all members thereof regardless of the amount of their dues, and shall be paid on all dues or initiation fees for a period commencing on or

after August first, nineteen hundred sixty-five. In the case of a life membership, the tax shall be upon the annual amount paid by active annual members as dues, whether or not the life member paid for or was admitted to such membership prior to the imposition of the tax under this article, and shall be paid annually by the person holding such life membership at the time for payment of dues by active annual members.

(3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.

* * *

§ 1110. IMPOSITION OF COMPENSATING USE TAX

Unless property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after August first, nineteen hundred sixty-five, except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business, (C) of any of the services described in paragraph (1) of subdivision (c) of section eleven hundred five, and (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described under paragraphs (2) and (3) of subdivision (c) of section eleven hundred five have been performed. For purposes of clause (A) of this section, the tax shall be at the rate of two percent of the consideration given or contracted to be given for such property, or for the use of such property, but excluding any credit for tangible personal property

accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser. For purposes of clause (B) of this section, the tax shall be at the rate of two percent of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him. For purposes of clauses (C) and (D) of this section, the tax shall be at the rate of two percent of the consideration given or contracted to be given for the service, including the consideration for any tangible personal property transferred in conjunction with the performance of the service, plus the cost of transportation of property so transferred and of the tangible personal property upon which the service was performed, except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchase;

* * *

§ 1116. EXEMPT ORGANIZATIONS

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

* * *

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

* * *

§ 1131. DEFINITIONS

When used in this part IV,

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership.

(2) "Customer" shall include: every purchaser of tangible personal property or services, every patron paying or liable for the payment of any amusement charge; and every occupant of a room or rooms in a hotel.

(3) "Tax" shall include any tax imposed by sections eleven hundred five, or eleven hundred ten.

(4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state, the use of which property is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into the possession or control of such person within the state; (b) all information services rendered to a person within the state, whether or not such services are rendered from or at a location within the state; and (c) all services rendered to a person within the state, whether or not such services are performed within the state, upon tangible personal property the use of which is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into possession or control of such person within the state.

* * *

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§ 1133. LIABILITY FOR THE TAX

(a) Every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to non-payment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax.

(b) Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.

(c) The tax commission may, whenever it deems it necessary for the proper enforcement of this article, provide by regulation that customers shall file returns and pay directly to the tax commission any tax herein imposed, at such times as returns are required to be filed and payment made by persons required to collect the tax.

(d) No person required to collect any tax imposed by this article shall advertise or hold out to the public in any manner, directly or indirectly, that the tax is not considered as an element on the price, amusement charge or rent payable by customers.

* * *

PERTINENT PROVISIONS OF ERIE COUNTY RETAIL SALES TAX ADOPTED MAY 27, 1947, AMENDED JUNE 2, 1964

* * *

SECTION 2. IMPOSITION OF TAX.

(a) Commencing July 1, 1964 there shall be paid a tax of three percentum upon the amount of the receipts from every retail sale or sale at retail in this county of tangible personal property, except as specified in schedule A of this section.

SCHEDULE A

Food and food products sold for human consumption including but not limited to cereals and cereal products; milk and milk products; meat and meat products; fish and fish products; eggs and egg products; vegetables and vegetable products; fruits; spices and salt; sugar and sugar products; candy and confectionery products; coffee and coffee substitutes; beer or other similar malt beverages; tea; cocoa and cocoa products; water when delivered to the consumer through mains or pipes; drugs, medicines, hearing aids, artificial limbs and other devices to correct or alleviate physical or dental incapacities or handicaps when sold upon a physician's or dentist's prescription; eyeglasses furnished upon an optometrist's prescription; newspapers and periodicals; and cigarettes, but not excepting soft drinks or sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages).

SECTION 3. SALES BY OR TO STATE, SUBDIVISIONS AND NONPROFIT ORGANIZATIONS.

(a) Except as provided in paragraph (b) of this section, receipts from sales by or to the following shall not be subject to tax hereunder:

* * *

2. The United States of America, in so far as it is immune from taxation;

* * *

SECTION 4. (A)TAX TO BE STATED SEPARATELY.

Upon each taxable sale the tax to be collected shall be stated and charged separately from the sale price and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor as trustee for and on account of the county, and the vendor shall be liable for the collection thereof and for the tax. The vendor shall be personally liable for the tax collected or required to be collected under this resolution, and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to nonpayment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of sale.

(b) Direct payment by purchaser. When the purchaser has failed to pay and a vendor has failed to collect a tax upon a sale, as imposed by this resolution, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the Director and it shall be the duty of the purchaser to file a return thereof with the Director and to pay the tax imposed

thereon to the Director within fifteen days after such sale was made. The Director may, whenever he deems it necessary for the proper enforcement of this resolution, provide by regulation that the purchaser shall file returns and pay directly to the Director the tax herein imposed, at such times as returns are required to be filed and payment over made by the vendors.

* * *

SECTION 5. COLLECTION OF TAX FROM PURCHASER. The Director shall by regulation prescribe a method or methods or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this resolution so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal three per centum of the total receipts from the sales of such vendor upon which a tax is imposed by this resolution. Notwithstanding the provisions of section 4(a) of this resolution, such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum and may be amended from time to time so as to accomplish the purposes herein set forth.

* * *

PERTINENT PROVISIONS OF ERIE COUNTY COMPENSATING USE TAX ADOPTED MAY 27, 1947, AMENDED JUNE 2, 1964

* * *

SECTION 2. IMPOSITION OF TAX. Commencing July 1, 1964 there is hereby imposed and there shall be paid by every person a tax on the use within the county of any tangible personal property purchased at retail. Such tax shall be at the rate of three per centum of the consideration given or contracted to be given for such property or its use plus the cost of transportation, except where such cost is stated and charged separately.

SECTION 3. EXEMPTIONS. The provisions of this resolution shall not apply:

* * *

(d) In respect to the use of property purchased at retail, where the purchase of such property because of its nature or use or because of the identity of its purchaser would be exempt by any applicable law from a tax on the retail sale of tangible personal property.

* * *

SECTION 4. VENDOR TO COLLECT TAX FROM PURCHASER.

(a) Every vendor maintaining a place of business in the county or having a resident employee in the county and making sales of tangible personal property the use of which is taxable under this resolution, and every other vendor who, upon application to the Director, has been expressly authorized to collect the tax, shall at the time of making such sales, or if the use is not then taxable hereunder, at the time such use becomes taxable hereunder,

collect the tax from the purchaser. The tax to be collected shall be stated and charged separately from the sale price and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor, and shall be paid by the purchaser to the vendor as trustee for and on account of the county, and the vendor shall be liable for the collection thereof and for the tax. The vendor shall be personally liable for the tax collected or required to be collected under this resolution. No vendor shall advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed by this resolution is not considered an element in the price to the purchaser.

(b) Where the vendor has not collected a tax imposed by this resolution, such tax shall be payable by the purchaser directly to the Director and it shall be the duty of the purchaser to file a return thereof and pay the tax imposed thereon.

* * *

SECTION 5. COLLECTION OF TAX FROM PURCHASER. The Director shall by regulation prescribe a method or methods or a schedule or schedules of the amounts to be collected from purchasers in respect to any property the use of which is subject to tax under this resolution so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal three per centum of the aggregate value of the tangible personal property sold. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

* * *

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Pro-*

vided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by non-residents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.